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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

MT. DIABLO INVESTMENT GROUP,  
LLC,

Plaintiff and Respondent,

v.

LOANVEST XII, L.P. et al.,

Defendants and Appellants.

A152944

(San Mateo County  
Super. Ct. No. CIV536047)

**MEMORANDUM OPINION<sup>1</sup>**

This appeal and related cross-appeals arise out of a lawsuit by Mt. Diablo Investment Group (MDIG) against two investment partnerships in which MDIG held limited partnership interests, Loanvest IX, L.P. and Loanvest XII, L.P. (collectively the “Loanvest LPs”). Also named as defendants were South Bay Real Estate Commerce Group LLC (South Bay) and George Cresson (Cresson), who are, respectively, the general partner and the managing member of the Loanvest LPs.

The operative complaint pleads four derivative claims against all defendants, with the Loanvest LPs named as nominal defendants, and two direct claims against South Bay and Cresson. MDIG, Cresson and South Bay entered a settlement agreement (Settlement) dated November 7, 2016, the terms of which included (1) cash payments

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<sup>1</sup> We resolve this case by memorandum opinion pursuant to California Standards of Judicial Administration, section 8.1. (See also *People v. Garcia* (2002) 97 Cal.App.4th 847, 853–855.)

totaling some \$450,000 by Cresson and South Bay to MDIG, to be paid over time, (2) an additional payment of \$50,000 upon any breach of the settlement terms, and (3) a retention of jurisdiction provision empowering the court to enforce the settlement terms pursuant to Code of Civil Procedure section 664.6. There was an addendum to the Settlement (the Addendum) by which MDIG agreed to transfer all right, title and interest in the Loanvest LPs to South Bay effective November 7, 2016.

Following the Settlement, MDIG prepared, and counsel for Cresson and South Bay signed, a Request for Dismissal with prejudice of the entire action, which the court clerk entered. It turned out, however, that the court's approval was needed to dismiss the derivative causes of action, which led to a motion by MDIG seeking entry of an amended dismissal. That motion sought a modification of the dismissal calling for the action to be dismissed with prejudice only with respect to the direct claims and dismissed without prejudice as to the derivative claims. On June 1, 2017, following a status conference, the court entered an order striking the dismissal. Then, on June 26, 2017, the court, construing MDIG's motion for an amended dismissal as a motion for the entry of judgment pursuant to the terms of the settlement, entered an order directing entry of Judgment of Dismissal Pursuant to Settlement pursuant to Code of Civil Procedure section 664.6. This order was entered on June 30, 2017 (the June 30 Judgment of Dismissal).

There followed some apparent disputes about alleged breach of the Settlement by the South Bay and Cresson, and, because the Judgment of Dismissal omitted any mention of the settlement terms, about what the terms of the Settlement were, among other things. After a series of motions by MDIG to enforce the Settlement, the court held a hearing November 7, 2017, and that day entered a minute order (the November 7 Minute Order) granting MDIG's motion for entry of an amended judgment and to enforce the terms of the Settlement. The November 7 Minute Order called for Cresson and South Bay to make the payments specified by the Settlement. On November 22, 2017, the court entered an order (the November 21 Order) formally memorializing the November 7

Minute Order, and pursuant to the November 21 Order entered an amended judgment (the November 22 Amended Judgment).

On November 14, 2017, the Loanvest LPs filed a notice of appeal purporting to be an “Appeal of June 30, 2017 Dismissal Order by Judge Weiner [and] Appeal of November 7, 2017 Minute Order. CCP664.6 [*sic*].” And on December 4, 2017, South Bay, Cresson and the Loanvest LPs filed what they styled as a cross-appeal, purporting to be an “Appeal of June 30, [*sic*] Dismissal Order by Judge Weiner, Appeal of November 22, 2017 Amended Judgment [*sic*] of Dismissal Pursuant to Settlement ccp664.6 [*sic*].” Piecing together these somewhat tangled procedural events, the net of the appellate posture in this case is as follows: We now have before us appeals by South Bay, Cresson, and the Loanvest LPs of (1) the June 30 Judgment of Dismissal, (2) the November 7 Minute Order, and (3) the November 22 Amended Judgment.<sup>2</sup>

The appeal and cross-appeal of the June 30 Judgment of Dismissal raise three issues: (1) MDIG had no standing to request modification of the dismissal, having relinquished all interest in the partnerships under the Addendum as of November 7, 2016, (2) the court “improperly” vacated the dismissal of the direct causes of action because the procedural error that justified vacatur and modification of the dismissal concerned only the derivative claims, and (3) if the court erred by vacating the dismissal of the direct causes of action, it improperly retained jurisdiction to enforce the settlement because the Loanvest LPs, who were not parties to the settlement, did not request the court to keep jurisdiction. The appeal and cross-appeal of the November 7 Minute Order and the November 22 Amended Judgment raise two issues: (1) the court failed to include the Addendum, which set forth some of the terms of the settlement, and (2) the court should

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<sup>2</sup> Loanvest IX, L.P. and XII, L.P., together, represented by John Francis Sullivan, and South Bay, represented by Mark Rushin, and Cresson, acting pro se, have filed separate opening briefs, and only the Loanvest LPs filed a reply (in which Cresson joined). The opening briefs take identical legal positions and are nearly word-for-word the same.

have struck the \$50,000 additional payment provision as an unenforceable liquidated damages provision.

We will dismiss the appeal of the November 7 Minute Order on the ground that it seeks review of a non-appealable interlocutory order (*Engel v. Worthington* (1997) 60 Cal.App.4th 628, 630–631) and we will dismiss the appeal of the June 30 Judgment of Dismissal as untimely. (Cal. Rules of Court, rule 8.104(a)(1).) The 60-day deadline for appealing the June 30 Judgment of Dismissal elapsed on August 29, 2018.<sup>3</sup> As to the November 22 Amended Judgment, the November 21 Order directing entry of an amended judgment expressly states that the Addendum was to be included,<sup>4</sup> yet the November 22 Amended Judgment that was actually entered—on a form prepared by MDIG—attaches only the Settlement, without the Addendum. That appears to be a ministerial error, since MDIG, in its respondent’s brief, states that it does not object to further modification of the November 22 Amended Judgment so that it attaches the Addendum.

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<sup>3</sup> Loanvest IX, L.P. and XII, L.P.—as distinguished from South Bay and Cresson—contend that the notice of entry of judgment was served on Mark Rushin, counsel for South Bay and Cresson only; that Rushin never entered an appearance for the Loanvest LPs, and that therefore the Loanvest LPs never received notice of entry of the settlement, and as a result, they had 180 days to appeal the June 30 Judgment of Dismissal. (Cal. Rules of Court, rule 8.104(a)(1)(C).) The idea that serving notice on counsel for the general partner of a limited partnership is ineffective as notice upon the limited partnership itself is unsustainable. (Corp. Code, § 15901.03, subd. (h) [“[a] general partner’s knowledge, notice, or receipt of a notification of a fact relating to the limited partnership is effective immediately as knowledge of, notice to, or receipt of a notification by the limited partnership”].) As a result, the logic behind the argument that the Loanvest LPs were entitled to 180 days rather than 60 days to appeal fails because these two entities had actual notice of entry of judgment. The Loanvest LPs contend that, to the extent there is any ambiguity about whether they were served effectively with notice of the June 30 Amended Dismissal, any doubt should be resolved in their favor. But there is no ambiguity about whether they were effectively served.

<sup>4</sup> Order of November 21, 2017 at p. 4 ¶ J (“The Addendum to the Settlement Agreement shall be part of the judgment.”).

We will therefore vacate and remand the November 22 Amended Judgment to correct the error in failing to include the Addendum. The dispute over the enforceability of the paragraph 5 of the Settlement—the provision calling for payment of an additional \$50,000 upon breach of any of the payment provisions—is moot. Here, too, MDIG states in its respondent’s brief that it has no objection to removing the \$50,000 additional payment provision. Apparently not wanting to take yes for an answer on either of these concessions by MDIG, the Loanvest LPs ask us to address the Addendum issue and enforceability of the payment provision anyway, because MDIG, as a condition of its concessions, has “required [the Loanvest LPs] to withdraw the remainder of their appeal.” We are dismissing “the remainder of their appeal,” so that is not a persuasive answer to the suggestion of mootness.

Accordingly, in accordance with MDIG’s concessions here on appeal, we will conditionally vacate the November 22 Amended Judgment so that the Addendum may be added and the reference to and the incorporation of paragraph 5 of the Settlement may be deleted.

### **DISPOSITION**

The appeals and cross-appeals of the June 30 Judgment of Dismissal and the November 7 Minute Order are dismissed. The November 22 Amended Judgment is conditionally vacated and remanded for correction and revision as noted above, but is otherwise affirmed and shall be reinstated as so corrected and revised.

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STREETER, J.

We concur:

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POLLAK, P.J.

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BROWN, J.

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